

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JOHN QUIRK
Public Defender Agency
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MARA McCABE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JERMAINE A. DRAKE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 18A02-0605-CR-367

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0410-MR-2

May 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jermaine A. Drake appeals his conviction for Murder,¹ a felony. Specifically, Drake argues that (1) there was insufficient evidence to identify him as the shooter, (2) the trial court erred in allowing a pastor to testify regarding his identity, and (3) the trial court erred in allowing the State to present a witness that it believed would testify untruthfully. Finding no error, we affirm the judgment of the trial court.

FACTS²

Approximately one week before October 2, 2004, Drake informed two of his friends—Jordan Williams and Jordan Quinn—that his in-car television had been stolen. Drake instructed the men to contact him if they learned the whereabouts of the television.

On October 2, 2004, David Adams contacted Chris Masiongale in Yorktown and informed him that he had a television to sell. Adams told Masiongale that he could keep any money over \$150 if Masiongale could sell the television. Masiongale agreed and called Quinn later that day regarding the television. Quinn subsequently called Drake and informed him that Masiongale had contacted him about a television. After speaking with Drake, Quinn called Masiongale and arranged a meeting between Masiongale and Drake.

After determining that Quinn would not be able to drive Drake to the meeting, Drake called Williams and informed him that “he knew who stole his tv and asked [] if [Williams] would go with him to go get it.” Tr. p. 375. Because Williams was at Ronnie Haste’s home

¹ Indiana Code § 35-42-1-1.

² We heard oral argument in Indianapolis on April 13, 2007. We commend counsel for their excellent written and oral presentations, and we thank the Carmel High School students who attended the argument for their presence and respectful demeanor.

when he received the call, he and Haste both went to Drake's apartment to pick him up. Williams drove his black Dodge Ram to the apartment because Haste was too intoxicated to drive. After picking up Drake, the three men drove to the arranged meeting place.

Masiongale, Adams, Kirt Trahan, and Masiongale's girlfriend, Lyndsey Scott, were outside Adams's home when a black Dodge Ram carrying three people arrived. Williams stepped out of the vehicle and asked to see the television. Drake also exited the vehicle, approached Masiongale and said, "Give me my shit." Id. at 121. Before Masiongale could answer, Drake shot him. Williams grabbed the television and said, "I got it come on," and the men got back into the vehicle and drove away.³ Id. at 206. While fleeing from the scene, Drake called his mother and "asked for two (2) tickets to California because he thought he just killed somebody." Id. at 385. Masiongale was taken to Ball Hospital, where he was pronounced brain dead the next morning and died after being removed from life support.

During the next few days, Williams, Scott, and Adams selected Drake's picture from a police photo array. On October 10, 2004, Drake, who had fled to California, contacted Carlos Kelly, a pastor in San Diego. Two days later, Kelly helped Drake turn himself in to the local law enforcement authorities.

On October 6, 2004, the State charged Drake with murder. A four-day jury trial began on February 27, 2006, and the jury ultimately found Drake guilty as charged. The trial court

³ Haste, who was intoxicated during the encounter, never left the vehicle.

held a sentencing hearing on March 30, 2006, and sentenced Drake to fifty-five years imprisonment. Drake now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Drake argues that the State presented insufficient evidence to identify him as the shooter. Specifically, Drake contends that “the only person close enough to put the gun to the victim’s head was the driver of the truck, [Williams].” Appellant’s Br. p. 9.

The standard of review for sufficiency claims is well settled. In addressing Drake’s challenge we neither reweigh the evidence nor reassess the credibility of witnesses. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). Instead, we consider the evidence most favorable to the verdict and draw all reasonable inferences supporting the ruling below. Id. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. O’Connell v. State, 742 N.E.2d 943, 949 (Ind. 2001). A conviction may be sustained wholly on circumstantial evidence if such evidence supports a reasonable inference of guilt. Maul v. State, 731 N.E.2d 438, 439 (Ind. 2000).

Drake argues that the evidence presented at trial established that there were three people in the Dodge Ram vehicle when it arrived at Masiongale’s location—Williams, Haste, and Drake. Paul Mellen, a forensic pathologist, conducted an autopsy on the victim and testified that Masiongale had been shot in the head at “close range” and that it was likely that “the muzzle or the dial of the firearm had to be in contact with the skin to cause [a slight

concentric abrasion].” Tr. p. 312. In sum, Drake argues that Williams’s own testimony that he was close enough to Masiongale to “reach out and touch him” put Williams in prime position to have shot Masiongale. Id. at 382.

To sustain a conviction for murder, the State had to present evidence to establish that Drake knowingly killed Masiongale. I.C. § 35-42-1-1(1). At trial, four witnesses testified that Drake shot Masiongale—Scott, Williams, Adams, and Trahan. All four testified that Drake was the passenger in Williams’s vehicle and that he shot Masiongale. Tr. p. 126-27, 205, 255, 382. For instance, Trahan testified that Williams, Masiongale, and Drake were “negotiating a price” for the television and that “all of a sudden [Drake] reached into his pocket like he was getting out some money. And then he pulled out a gun and shot [Masiongale].” Id. at 255. As a result of the gunshot wound, Masiongale was pronounced brain dead the next morning and died after being removed from life support.

While Drake presents an alternative theory regarding the events preceding Masiongale’s death, his argument is merely an invitation for us to reweigh the evidence—a practice in which an appellate court does not engage. Thus, we conclude that the State presented sufficient evidence to sustain Drake’s murder conviction.

II. Kelly’s Testimony

Drake argues that Kelly’s testimony was improperly admitted because the communications between Kelly and Drake were privileged pursuant to Indiana Code section 34-46-3-1. Specifically, Drake argues that because the conversation he had with Kelly—a pastor—was privileged, Kelly should not have been allowed to testify at the trial at all.

The decision to admit or exclude evidence is within the trial court's sound discretion and that decision is afforded a great deal of deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). The admission or exclusion of evidence will not generally be reversed absent a manifest abuse of discretion that results in a denial of a fair trial. Zawacki v. State, 753 N.E.2d 100, 102 (Ind. Ct. App. 2001). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

Drake argues that Kelly should not have been allowed to testify pursuant to Indiana Code section 34-46-3-1, which provides, in relevant part:

Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications . . . [:]

(3) Clergymen, as to the following confessions, admissions, or confidential communications:

(A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church.

(B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor.

This privilege must be strictly construed because of its statutory derivation. Mullins v. State, 721 N.E.2d 335, 338 (Ind. Ct. App. 1999).

Kelly's testimony at trial comprised three pages of the 685-page trial transcript and produced the following evidence: Kelly was a full-time pastor in San Diego, Drake contacted him on October 10, 2004, and, as a result of that contact, Kelly assisted Drake "in turning himself in to local law enforcement authorities on October 12, 2004." Tr. p. 620-22.

Drake argues that “if any of his communication [with Kelly] was held to be confidential then his entire communication including his name and identity” should also be confidential. Appellant’s Br. p. 13. Drake argues that the sole purpose of Kelly’s testimony was to highlight Drake’s flight to California, creating a presumption of guilt.

The State directs us to Mullins, which held that a defendant’s communications with a Catholic priest outside of the priest’s course of discipline were not privileged. 721 N.E.2d at 338. The State argues that “if the testimony at issue does not address those communications that are made in the course of the clergyman’s discipline, then the privilege does not apply, and there is no error.” Appellee’s Br. p. 12.

As the State concedes, the actual substance of Drake’s communication with Kelly is protected pursuant to Indiana Code section 34-46-3-1 because Kelly’s counsel was sought in his professional character as a spiritual adviser or counselor. However, Kelly did not testify about the substance of the confidential communication. Instead, he only testified that he had been in contact with Drake on October 10, 2004, and that, as a result of that contact, he assisted Drake in surrendering to local law enforcement authorities.

While it would have been error for the trial court to allow Kelly to testify about the substance of Kelly and Drake’s spiritual communication, we cannot conclude that the trial court abused its discretion when it allowed Kelly to testify in the limited fashion described above. Furthermore, while the gravamen of Drake’s argument is that Kelly’s testimony emphasized Drake’s flight to California, Williams also testified that Drake called his mother immediately after the shooting and “asked for two (2) tickets to California because he

thought he just killed somebody.” Tr. p. 385. Therefore, Williams’s testimony was independent evidence of Drake’s planned flight to California.⁴

The plain language of Indiana Code section 34-46-3-1 protects “communication” with a clergyman “in the course of discipline.” Because Kelly’s testimony did not reveal the substance of his communications with Drake, we cannot conclude that the trial court abused its discretion by allowing Kelly to testify that he had contact with Drake in San Diego and that he helped Drake turn himself in to the local authorities.

III. Williams’s Testimony

Drake argues that the trial court erred by allowing Williams to testify because the State could not have believed that Williams would testify truthfully. Specifically, Drake points out that the State charged Williams with murder and imprisoned him until he agreed, on the night before Drake’s trial, to testify against Drake.

As noted above, the decision to admit or exclude evidence is within the trial court’s sound discretion and that decision is afforded a great deal of deference on appeal. Bacher, 686 N.E.2d at 793. The admission or exclusion of evidence will not generally be reversed absent a manifest abuse of discretion that results in a denial of a fair trial. Zawacki, 753 N.E.2d at 102. The knowing use of perjured testimony is fundamentally unfair, and a conviction obtained by the use of such testimony will not be upheld. Wallace v. State, 474 N.E.2d 1006, 1008 (Ind. 1985). While it is well established that the knowing use of perjured

⁴ While the State asserted at oral argument that one of the police officers testified that he accompanied Drake from California after his arrest, a careful review of the record does not reveal such testimony.

testimony constitutes grounds for reversal, it is equally clear that contradictory or inconsistent testimony does not constitute perjury and that it is up to the jury to resolve conflicting testimony. Baxter v. State, 727 N.E.2d 429, 433 (Ind. 2000).

Drake notes that on October 5, 2004, Williams made a deal with the State that the State would not file charges against him if he testified truthfully at Drake's trial. Tr. p. 393. However, Williams subsequently failed two voice stress tests, and the State charged him with Masiongale's murder on March 16, 2005. Drake argues that the State's decision to charge Williams with murder proves that it believed he was the shooter.

Drake admits that any inconsistencies between Williams's original statement and his trial testimony are minor. Id. at 396. Moreover, Drake cross-examined Williams at trial and elicited Williams's potential biases. Specifically, Drake's cross-examination confirmed that Williams had been charged with Masiongale's murder in March 2005 and that he had been imprisoned until he "made a deal with the Prosecution" the night before Drake's trial. Id. at 393-96.

While we acknowledge that the knowing use of perjured testimony is fundamentally unfair, we cannot conclude that the State presented Williams at trial knowing that he would testify untruthfully, if that even is the case. For all intents and purposes, Williams's testimony coincided with a statement that he gave to police three days after Masiongale's murder. As our Supreme Court has provided, "judging the credibility of witnesses lies squarely within the province of the jury," and an appellate court will not reassess the jury's credibility determinations. Stephenson v. State, 742 N.E.2d 463, 497 (Ind. 2001). Therefore,

we cannot conclude that the State called a witness that it knew would testify untruthfully, and we leave the responsibility to evaluate Williams's credibility to the jury.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.